UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

REYNAUD CHANDLER,

Petitioner, 9:06-CV-1024 (TJM)(GJD)

v.

STATE OF NEW YORK,

Respondent.

APPEARANCES:

REYNAUD CHANDLER
Petitioner, *pro se*

THOMAS J. McAVOY, SENIOR JUDGE

DECISION and ORDER

By prior Order of this Court, petitioner Reynaud Chandler was afforded the opportunity to submit an amended petition establishing that his petition for a writ of habeas corpus was timely filed under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[1] Dkt. No. 4.

Petitioner's amended petition is before this Court for consideration. Dkt. No. 5.

Petitioner seeks habeas corpus relief from his plea of guilty entered in Albany County Court on a charge of third degree possession of a controlled substance. Petitioner was arrested on October 9, 1989, following a traffic stop and the seizure of drugs from the automobile in which petitioner was a passenger. Dkt. No. 2 at 1.

As noted in the Court's prior Order, petitioner's conviction became "final" prior to the effective date of the AEDPA and he was therefore afforded a one year grace period – until April 24, 1997 – in which to seek habeas corpus relief. Dkt. No. 4 at 3.

[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Because the only state court action commenced by petitioner to challenge his conviction was a CPL 440.10 motion filed in state court in 2005, the Court determined that his claims were time-barred. The Court also ruled that petitioner had not demonstrated that he could properly proceed challenge his conviction on the basis of an affidavit received in May, 2005, from the driver of the car. *Id*.; *see* 28 U.S.C. § 2244(d)(1)(D). In light of petitioner's *pro se* status, however, he was afforded the opportunity to submit an amended petition establishing that this action was properly filed.

In his amended petition, petitioner reasserts his argument that because the § 2254 petition was filed within one year of the date on which state court proceedings on his CPL 440.10 motion were concluded, this action is timely filed. Dkt. No. 5 at 2-3. However, as petitioner was previously advised, the AEDPA's tolling provision does not operate so as to restart the one-year limitations period at the conclusion of the state court proceedings. Dkt. No. 4 at 3; *see Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000).

The Court has also considered petitioner's claim that he may properly challenge his conviction on the basis of affidavit evidence received in May, 2005 from Basil Smith, the driver of the car who was also charged in the incident and pleaded guilty to a "lesser" role. Dkt. No. 5 at 2 and ex. D (Affidavit of Basil Smith).[2] In this affidavit, Smith states that he was the sole owner of the drugs and that petitioner did not know

[2] Petitioner had apparently been trying to locate this person and had sought information regarding the affiant's whereabouts from his criminal attorney in approximately January, 2005. Dkt. No. 5 at ex. C.

that the drugs were in the car. Smith further states that he now regrets that his fear of jail-time caused petitioner to suffer irreparable harm. *Id*., Smith Aff. at 3. Petitioner asserts that Smith's affidavit is "new evidence" which establishes his innocence and requires that his conviction be vacated. Dkt. No. 5 at 2.

Petitioner commenced a state court proceeding to vacate his conviction pursuant to CPL 440. The state court denied the motion, ruling that relief from a conviction based upon a "recantation" affidavit is available only where there has been a conviction after trial and, moreover, because the evidence would serve only to impeach or contradict petitioner's statement at his plea colloquy and would not require vacatur. Dkt. No. 5, ex. A (Decision of Breslin, S.C.J. dated March 7, 2006). Petitioner contends this action was timely commenced within the one year period which commenced in May, 2005 when he received the affidavit, giving effect to the tolling occasioned by the state court proceedings.

To show actual innocence, a petitioner must prove in light of new, reliable, evidence that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Moreover, a showing of actual innocence is only a gateway to habeas corpus review. "[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853 (1993).

In this case, petitioner claims that he would not have pleaded guilty had he known that Smith had "let the state judge and the prosecutor know" that the drugs

belonged to Smith. Dkt. No. 5 at 2. Even assuming, *arguendo*, that Smith made this disclosure,[3] the affidavit is not evidence that petitioner's plea was constitutionally infirm. In all events, while Smith's alleged statements might have persuaded petitioner to proceed to trial, petitioner has not demonstrated that on the basis of this testimony, had it been forthcoming at a trial,[4] "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Based upon the foregoing, the Court finds that this habeas corpus proceeding was not timely filed under the AEDPA. Accordingly, this action is dismissed.

WHEREFORE, in light of the foregoing, it is hereby

ORDERED, that this action is dismissed as time-barred for the reasons set forth herein and in the Court's prior Decision and Order in this action (Dkt. No. 4), and it is further

ORDERED, that the Clerk serve a copy of this Decision and Order on petitioner.

IT IS SO ORDERED.

April18,2007

Thomas J. McAvoy
Senior, U.S. District Judge

[3] Smith states only that he made these facts known to his lawyer. Dkt. No. 5, ex. D Smith Aff. at 1.

[4] Smith never states that he would have testified on petitioner's behalf. Rather, Smith merely expresses regret that he acted out of fear and selfishness to protect himself and states that he now seeks a clear conscience. Dkt. No. 5 ex. D Smith Aff. at 3.